

Judge Ronald B. Leighton

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

ANDRE THOMPSON, a single man; and
BRYSON CHAPLIN, a single man,

Plaintiffs,

vs.

CITY OF OLYMPIA, a local government
entity; and RYAN DONALD and "JANE
DOE" DONALD, individually and the
marital community comprised thereof,

Defendants.

NO. 3:18-cv-05267

PLAINTIFFS' TRIAL BRIEF

I. INTRODUCTION

Plaintiffs Andre Thompson and Bryson Chaplin respectfully submit this Trial Brief to the Court. Following the Court's denial of Defendants' motions for summary judgment, the following claims remain at issue for trial:

1. Plaintiffs' §1983 claims against Defendant Officer Donald for his unreasonable use of deadly force;

PLAINTIFFS' TRIAL BRIEF
Page 1 of 41
3:18-cv-05267

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2. Plaintiffs' §1983 claims against the City of Olympia for failing to adequately train its officers to handle usual and recurring situations with which they must deal and that the City's deliberate indifference to the obvious consequences of its failure to train was the moving force that caused the ultimate injury to the plaintiffs, in violation of U.S.C. 42, section 1983.

3. Plaintiffs' state law claim of negligence against Officer Donald for unreasonable tactical conduct and decisions leading up to the use of deadly force show, as part of the totality of circumstances, amounting to negligence.

4. Plaintiffs' state law claim for the tort of Outrage against both Defendants.

II. EXCESSIVE FORCE

On May 21, 2015 at approximately 1:00 a.m., Mr. Bryson Chaplin was caught attempting to steal beer from Safeway grocery store located in Olympia Washington. Mr. Andre Thompson accompanied Mr. Chaplin, but was not involved in the attempted theft. Police were called to the Safeway store, but Mr. Chaplin and Mr. Thompson had fled the scene before they arrived.

At approximately 1:14:57 a.m., Officer Donald reported to dispatch that he had spotted two men matching the description of the suspects walking with skateboards northbound on Cooper Point Rd. The area where Officer Donald pulled over his patrol vehicle is residential with "low hanging trees" and "almost pitch black."

PLAINTIFFS' TRIAL BRIEF

Page 2 of 41

3:18-cv-05267

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Because Officer Donald had only turned on his driver's side spotlight and did not immediately identify himself as a police officer when he "asked" Plaintiffs to take a seat in front of his patrol vehicle, Mr. Thompson believed it was perhaps a campus security officer wanting to make contact. Wanting to avoid an encounter, Mr. Thompson and Mr. Chaplin began crossing Cooper Point Rd. when Thompson heard a male voice yell, "Stop" "Olympia Police." Not wanting a confrontation, not wanting his brother arrested for shoplifting, wanting to avoid any contact with police, the two brothers began running north, away from Officer Donald. While running, they heard multiple gunshots.

A. First Volley of Shots

Unbeknownst to Officer Donald, **Ittika Frazier** and **Kaleigh Savage** whose home faced Cooper Point Road and whose upstairs bedroom window was later damaged

PLAINTIFFS' TRIAL BRIEF

Page 3 of 41

3:18-cv-05267

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1 by a stray bullet from Officer Donald's gun were awake when they were alerted to
 2 sounds of gunfire outside their bedroom window. Frazier told police:

3 A. And then I hear yelling and, uh, like a lot of.. urn, like, uh, key sounds, like
 4 jiggling sounds. Because there's like no other sounds on the Cooper Point
 5 Road except when some body's walking and it's like you can only hear that.
 6 Right. Urn, ... and then jingling sounds. And then, uh, somebody saying, uh,
 7 "police! Stop! Police! Stop!" Um, and then like .. *I just heard like ji-, like*
 8 *running sounds type and then the shots started going off* And, urn, ...

9 Q: So the jiggling sound like someone was running? Yeah.

10 Savage, told police:

11 And we didn't really hear anything too much at first. It was really quiet.
 12 But, then we heard get on the ground, urn, really authoritative, urn, guessing that was
 13 the police officer. Urn, and *then we kind of heard some scuttling around, like they*
 14 *could be running. Um, but then there was, I think, two or three gunshots at first.*

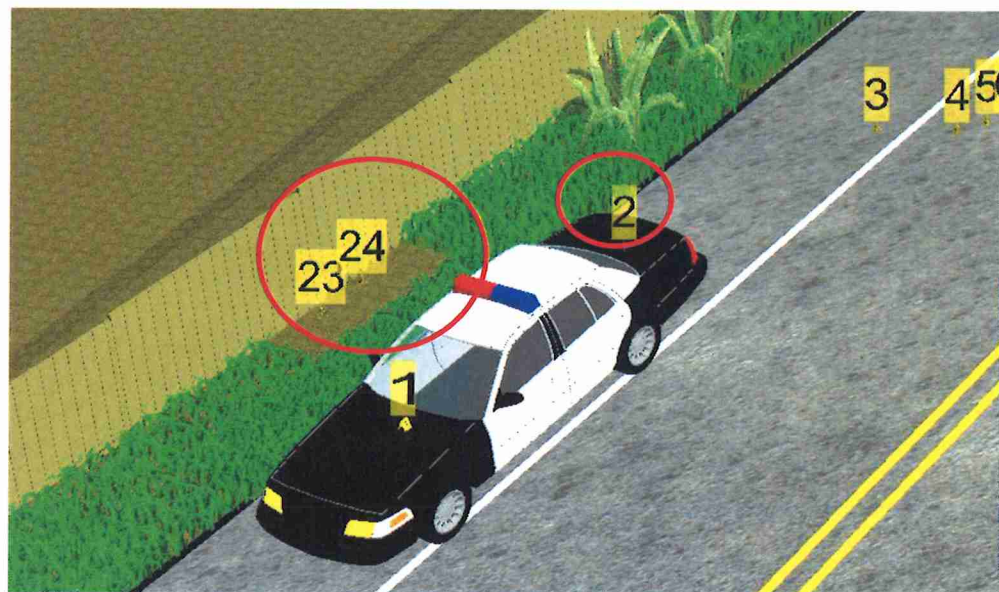
15 Officer Donald also initially told investigating officers immediately following the
 16 incident that Plaintiffs were "running" before the initial encounter near the patrol vehicle.
 17 Five days later, during his investigative interview with his guild attorney at his side, his
 18 story changed, however. Now, the plaintiffs were "walking" past his patrol vehicle when
 19 he moved to the rear of his patrol vehicle to "meet up with them."

20 Evidence at the Scene.

21 When the investigative team arrived to document the evidence, they found three
 22 "linear" bullet strikes in the pavement at the rear of the patrol vehicle.
 23



Officers also located three spent cartridge casings on the passenger side of the patrol vehicle (#23, #24, plus one more) and one at the right rear corner (#2). It was later determined Officer Donald fired four shots while at the rear of the patrol vehicle.



PLAINTIFFS' TRIAL BRIEF

Page 5 of 41

3:18-cv-05267

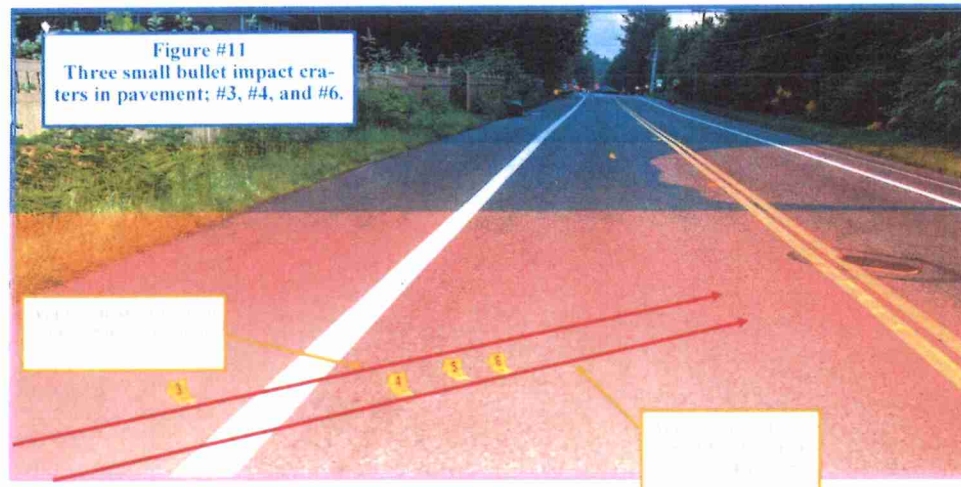
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1 Police also noted a “3 foot area in the grass behind the patrol vehicle that was
2 matted down” with “what appeared to be foot prints in the matted grass that appear” as
3 though “someone walked in the ditch between the vehicle and the fence.”



12 Based on how the bullet fragments were imbedded in the roadway, the grassy
13 depression next to the fence line, the three spent casings on the passenger side of the
14 patrol vehicle, the location of the ejection portal on the right side of the firearm, the spent
15 casings ejecting to the right, crime scene reconstruction expert, Kay Sweeney,
16 determined if the shooter was standing in the grassy depression next to the fence line
17 firing in an easterly direction, the spent casings would land where they were located –
18 next to the passenger side of the patrol vehicle.
19
20
21
22
23



The scene revealed Officer Donald fired three warning shots into the pavement and one shot in an unknown direction when Plaintiffs did not heed his command to stop and fled north on Cooper Point Rd.

Donald's Story

PLAINTIFFS' TRIAL BRIEF

Page 7 of 41

3:18-cv-05267

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1 In a desperate attempt to explain why there were three bullet strikes in the
2 roadway, why he later shot and paralyzed Chaplin and wounded Thompson, Officer
3 Donald concocted an elaborate story about how the Plaintiffs must have conspired to
4 murder him. Thompson, though stumbling with alcohol intoxication, with the reflexes of
5 a cat, suddenly and unexpectedly grabbed his right arm while pushing him down at a “45
6 degree” angle with his left arm. And as he was being held down by Thompson, Chaplin
7 raised his skateboard above his head, aiming the trucks of the skateboard perfectly in line
8 with Officer Donald’s head. (Donald’s re-enactment).



24 PLAINTIFFS' TRIAL BRIEF

25 Page 8 of 41

26 3:18-cv-05267

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Fearing he was about to be killed if struck, unable to defend himself in any way, not able to lay one finger on Thompson as he was being overpowered, Officer Donald unholstered his gun and fired four times – one of the bullets wounding Chaplin’s right arm (Donald’s new theory of how Chaplin’s arm was injured). How did Chaplin’s skateboard miss striking Thompson’s arm/shoulder” if he/Chaplin “follow[ed] through with the swing”? How did drunken Chaplin align the “trucks” of the skateboard perfectly with his head in such darkness? How did the bullets miss Chaplin’s torso when Officer

PLAINTIFFS’ TRIAL BRIEF

Page 9 of 41

3:18-cv-05267

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Donald was “aiming for center mass” with Chaplin standing only “two feet” away?
How did three, bullet strikes end-up in the roadway if Donald fired all four shots in rapid
succession? How did three, bullet strikes end-up in the roadway in linear fashion if
Officer Donald was firing his gun while pushed/pulled in all direction and if he fired in
the directions depicted below by Officer Donald?

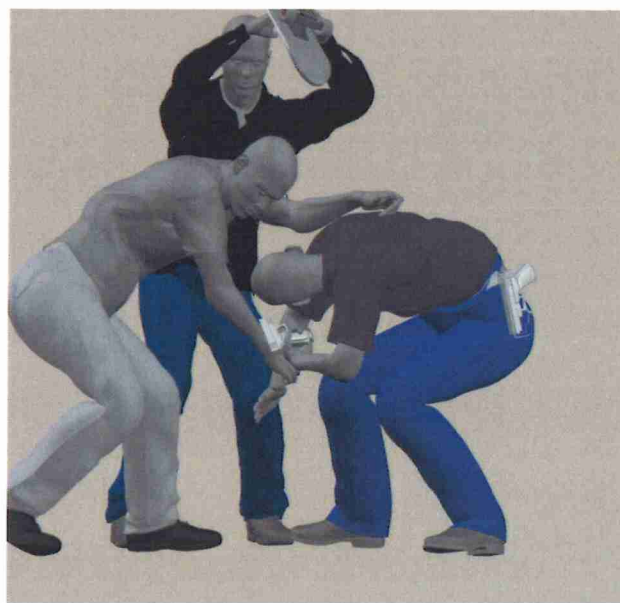
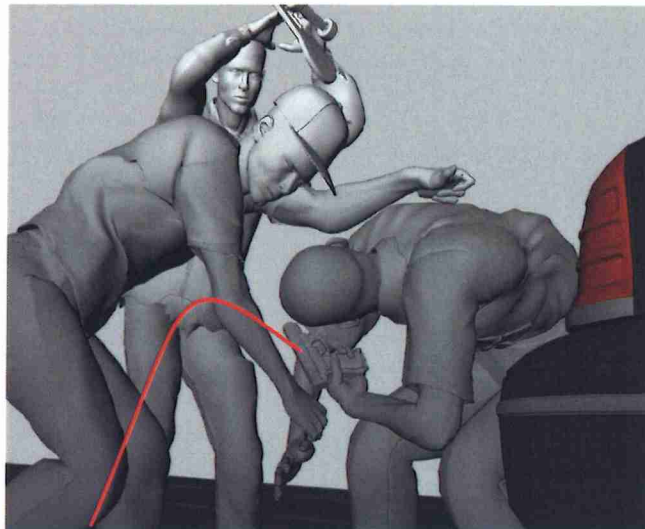


Why did Officer Donald not fight back? Why did he not use his defensive maneuvers?
How did intoxicated Thompson manage to overpower and hold Officer Donald down
without Officer Donald defending himself? Questions jurors may ponder.

When defense expert **Kenton Wong** was asked how the spent casings could have
landed on the passenger side of the patrol car if shots were fired in the manner depicted
below, Wong replied:

Whether there's enough movement and whether the expended cartridges casings,
upon ejection, would have struck somebody's arm or somebody's shirt or

1 somebody's leg, I can't say. But if it flew unimpeded and did not strike anything
2 as it was ejected from the ejection port, they would have landed in the grass.



22
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24 **PLAINTIFFS' TRIAL BRIEF**

25 **Page 11 of 41**

26 3:18-cv-05267

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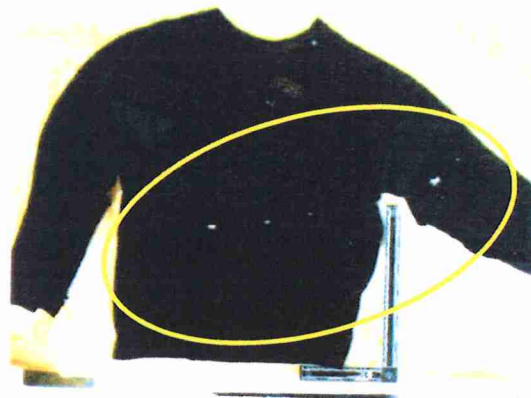
Many obstacles “impeded” the spent cartridge casings from landing on the other side of Officer Donald’s patrol vehicle: Donald’s face; Donald’s head; his arm; his neck; his shoulder; his chest; the rear of the patrol car; the car’s bumper.

Chaplin’s Right Arm Wound

Forensic scientists from the Washington State Patrol crime laboratory, Dr. John Lacy, and Kay Sweeney will refute Officer Donald’s new theory of how Chaplin’s arm became injured.

Kathy Geil who examined Chaplin’s sweatshirt testified there were five bullet holes in the back of his sweatshirt in “linear” fashion – meaning the holes were “all from the same bullet and they are just flying in a general direction because the velocity and the mass of that bullet is not going to be deflected too much, unless it hits a significant target.”

sweatshirt damage



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PLAINTIFFS’ TRIAL BRIEF

Page 12 of 41

3:18-cv-05267

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1 Unlike the other entry bullet holes which were clearly circular, forensic scientist
2 Margaret Barber determined the right arm bullet holes were “mushroom” in shape and
3 size, consistent with a sweatshirt fragment from the right arm found at the location.



12 Dr. John Lacy, a medical examiner, also testified unequivocally that the wounds
13 on Chaplin’s right arm were consistent with a “deformed bullet” fragment re-entering and
14 re-exiting. He stated:

16 *“The wound is irregular in its shape. It has a very asymmetric marginal*
17 *abrasion. It’s size is unusual, and the location on the body should not*
18 *produce those change in the wound appearance, had the bullet been intact*
19 *when its struck.”*



Kay Sweeney, by actually examining Bryson's sweatshirt and his undershirt, by reviewing Dr. Lacy's conclusion, by reviewing Ms. Barber's report, by reviewing Ms. Geil's statements, by reviewing the medical records, similarly determined the hollow-point bullet that entered Chaplin's back fragmented and exited – one small fragment damaging the sweatshirt and the larger fragment re-entering Chaplin's right arm before again exiting – causing the linear pattern on the sweatshirt consistent with the wounds/scars sustained by Chaplin.



PLAINTIFFS' TRIAL BRIEF

Page 14 of 41

3:18-cv-05267

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B. Second Volley – Shooting of Chaplin

It is undisputed Officer Donald shot Plaintiff Chaplin multiple times after he emerged from the woods. It is undisputed that officers Paul Evers and Luke O'Brien were already at the scene before the second and third volley of shots were fired. It is undisputed that when officers Evers and O'Brien ran towards Plaintiffs Chaplin and Thompson in the woods, Plaintiffs changed their direction and ran back in the direction from which they came. It is undisputed Plaintiffs ran to get away from Evers and O'Brien. It is also undisputed that Bryson was found approximately 20 feet from where Donald stated he was standing when he shot Bryson as he emerged from the woods.



Donald claimed that Bryson stumbled back a “few feet” and collapsed onto the road before he began rolling side to side. This testimony is contradicted by medical experts who opined the bullet that shattered Chaplin’s vertebrae at T-11 would have resulted in Chaplin becoming immediately incapacitated. Dr. Lacy testified, “I think it’s probably more likely than not that he would have collapsed right away.”

Dr. Seth Stankus similarly determined:

“Within a reasonable degree of medical certainty, this injury would have caused an acute and complete spinal cord injury. This injury would have produced an immediate and complete loss of function of both lower extremities, a flaccid paraplegia. Mr. Chaplin would have been immediately incapacitated and fallen to the ground.”

Plaintiff Chaplin denies attempting to attack Officer Donald with his skateboard. In the darkness, he could not see where Officer Donald was standing when he emerged from the woods. He does not recall hearing Officer Donald’s commands to stop, to get on the ground before being shot. He ran from officers Evers and O’Brien. He ran to get away from Officer Donald. He did not try to murder Officer Donald with his skateboard when there were other officers already at the scene right behind him.

C. Third Volley – Shooting of Thompson

It is undisputed that Plaintiff Thompson was not armed with a weapon; was not reaching for a weapon; did not have anything in his hands that could be used as a weapon; did not have anything in his hands that could be mistaken for a weapon; did not have on a coat that could hide a weapon.

PLAINTIFFS’ TRIAL BRIEF

Page 16 of 41

3:18-cv-05267

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1 Plaintiff Thompson admits yelling at Officer Donald after witnessing Donald
2 shoot his brother multiple times. He admits yelling, "Bro! Bro! Bro!" after his brother
3 fell to the ground and he heard his brother's painful cries. He admits yelling, "Why did
4 you shoot my brother?" "Are you going to kill me too?" He admits yelling profanities at
5 Officer Donald. He admits not getting down as ordered by Officer Donald.

6 Plaintiff Thompson denies Officer Donald warning he will shoot. No civilian
7 witness heard Officer Donald give warning he would shoot. He denies attempting to
8 disarm Officer Donald. He was not on a suicide mission to take away Officer Donald's
9 gun and kill Officer Donald – especially with other officers at the scene right behind him.

11 Officer Donald claimed he shot Thompson because he feared Thompson would
12 disarm him. He claimed Thompson was so close, he could see Thompson's eyes "target
13 glancing" his weapon. So close Thompson's hand was about to grab his gun. So close
14 Thompson's torso was "three feet" from the muzzle of his gun. He had no choice but to
15 shoot.
16

17 [Why did he not re-holster his gun to better retain it as taught at the academy?
18 Why did he not transition to a less lethal force?]
19
20
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23

24 PLAINTIFFS' TRIAL BRIEF

25 Page 17 of 41

26 3:18-cv-05267

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(Donald's re-enactment).

Contrary to Donald's story, firearm examiner Kathy Geil determined that the drop-off distance of the gun particle residue was 48 inches. Sweeney who later examined Thompson's T-shirt under a microscope concluded there were no gunshot residue particles on Thompson's white T-shirt. Meaning, Thompson was more than 48 inches/four feet away from the muzzle of Officer Donald's gun. [Detective Claridge never sent Thompson's T-shirt to the crime lab for gunshot residue analysis. Kenton Wong never examined the T-shirt for gunshot residue].

Kenton Wong opined maybe the wind blew the particles away; maybe the rain washed it away. It was not raining that night. It was not windy that night. And very unlikely Thompson's blood would have gotten rid of every single piece, every scintilla of gunshot particle.

1 **D. Donald had time to transition to less lethal force.**

2 When asked why he did not transition to less lethal force to apprehend Chaplin
3 and Thompson, Officer Donald replied “*[He] had [his] firearm out, and it was much*
4 *easier.*” He added, he could not transition because “*The pace at which [Thompson] was*
5 *advancing on me, it was impossible for me to transition to another force tool, to holster*
6 *my weapon.*”
7

8 When confronted at his deposition and when he realized he actually had 28
9 seconds to either holster his gun or transition to less lethal force, he claimed:

10 ■ *I have a 100% failure rate with my Taser. The one time I did use my Taser,*
11 *it was ineffective.* [Not true.]

12 ■ *I also have a hundred percent failure rate using a bean bag shotgun, as*
13 *well.* [Not true.]

14 ■ *OC has a very high ineffective rate.* [Not true.]

15 In fact, his own police practice expert, **Jeffrey Paynter**, insisted the tools are NOT
16 ineffective and added, “No officer would believe that.”

17 **E. Donald did not understand when he could use deadly force.**

18 General Order 1.3 in effect during May 2015 strictly defined when deadly force
19 may be employed. Paragraph 1.3.2(I) reads:

20 Deadly force may be employed only when necessary to protect the officer or
21 others from what he/she reasonably believes is an immediate threat of death or
22 serious physical injury.
23

1 Serious physical injury (as described in RCW 9A.04.110) is defined as “**an injury that**
2 **involves substantial risk of death, major permanent disfigurement, or protracted**
3 **loss/impairment of the function of any bodily part or organ.**”

4 During his deposition, Officer Donald was asked a series of questions, starting
5 with the definition of “serious physical injury.” He answered:

6
7 *I couldn’t tell you what the – what the law definition is, but anything that could*
8 *cause you serious physical pain. It could be a number of things.*

9 When asked if the OPD policy defines serious physical injury as “substantial risk
10 of death, major permanent disfigurement, or protracted loss/impairment of a function of
11 any bodily part or organ,” Donald responded:

12 *I have not seen that policy. I can’t tell you what the policy is.*

13 Further questioning revealed that Donald’s understanding of “serious physical
14 pain” completely contradicted what is in the protocol. When asked:

15 **Q:** *Officer Donald, when he grabbed your arm and he was*
16 *pushing you down, were you thinking that you were*
17 *going to be serious-- you were going to suffer serious physical injury?*

18 **A:** *Absolutely.*

19 Thinking Donald must have misunderstood the question and giving him the
20 opportunity to reflect before answering, he was again asked.

21 **Q:** *The question officer was whether you believed when he grabbed your*
22 *arm and put his hand, the other hand, on your back and pushing you*
23

Again, Donald did not disappoint. Without a moment's pause or hesitation,

A: *Absolutely. I don't know why else you would assault a police officer, let alone anybody, rather than -- other than to cause them injury.*

A: *There absolutely could have been.*

III. *Monell* CLAIM

PLAINTIFFS' TRIAL BRIEF
Page 21 of 41
3:18-cv-05267

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1 force was inevitable; he prematurely withdrew his gun when deadly force was clearly not
2 necessary; he did not attend training or was not tested for proficiency as required.
3 Having knowledge, the City was deliberately indifferent to Officer Donald's
4 shortcomings. Ultimately, Officer Donald's shortcomings and the City's failure to
5 adequately train resulted in Officer Donald shooting his gun because "it was easier." It
6 was easier to just shoot two men who did not heed his commands to get down, rather than
7 wait 60 seconds for Officers Evers and O'Brien who were already at the scene and ready
8 to assist. It was easier to just shoot than to use less lethal force to apprehend the
9 plaintiffs.
10

11 And the City's knowing failure to address Donald's habit of putting himself in
12 perilous situations and then physically engaging suspects amounted to a training
13 inadequacy so egregious that a constitutional violation was a highly predictable
14 consequence under §1983.
15

16 **A. City had knowledge Donald had numerous issues as a Training Officer.**
17

18 Olympia Police Department (OPD) hired Officer Donald on 11/1/2011. He
19 completed his probationary training officer status (PTO) in May 2013. The Olympia
20 Police Department had knowledge that Officer Donald had issues relating to his
21 competence as an officer, his capacity to control his emotion, and his ability to exercise
22 sound judgment, because there were clear warning signs prior to May 2015.
23

24 PLAINTIFFS' TRIAL BRIEF

25 Page 22 of 41

26 3:18-cv-05267

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- 1 ■ 4/18/2012 -- Off Donald believed he could “**pick and choose**” the use of
2 force he should use or use the “highest level of enforcement allowed.

3
4 Donald’s responses to the level of enforcement that should be used:

5 *“The best way to resolve the issue is to be firm and consider the highest level*
6 *of enforcement allowed, rather than encourage them [homeless people] to*
7 *leave the area, expecting that you will not have any further problems in the*
8 *future.”*

9 *Is this what you believe or what you are being taught? What factors might
10 one take into consideration before engaging in “the highest level of
11 enforcement allowed?”

12 This is what I’m being taught, in my opinion, from other officers. *Like I’ve*
13 *been instructed several times already, I should pick and choose what way I*
14 *like doing things, and in what ways I will differ from how I see things being*
15 *handled.*

- 16 ■ 4/23/12023 -- Off Donald lacked Defensive Tactics (DT) skills and was in
17 need of additional training.

18 Question: They were somewhat surprised by the lack of variety of techniques
19 the academy taught you. Would you like to receive additional DT training?

20 Donald response: *“Yes, without a doubt I would like to attend more*
21 *defensive tactics training if it becomes available.”*

22 ***Donald, however, failed to attend three (3) DT training courses in 2015
23 prior to the incident in May 2015.

- 24 ■ 4/27/2012 – Off Donald was failing to include “important facts” in his
25 reports.

- 1 ■ Off Donald did not respond to criticisms appropriately during
2 debriefings.

3
4 Donald and I debriefed this call several times; each time we spoke about
5 the call it became evident we still didn't fully understand the call's
6 various components. I could tell Donald was frustrated during our
debriefs because he grew more and more pensive and less
communicative.

- 7 ■ 5/6/2012 – Off Donald's ability to recall the incident was not accurate.

8 There were concerns that Off Donald's memory of events as recited by
9 Officer Donald were not accurate.

- 10 ■ 5/20/2012 – Off Donald could not adequately communicate with other
11 responding officers.

- 12 ■ 5/31/2012 – Off Donald continued to struggle communicating with other
13 officers when responding.

- 14 ■ 6/14/2012 -- Off Donald had issues regarding situational awareness and
15 officer safety:

16
17 Off Donald continued to react emotionally and inappropriately when
18 responding to a call regarding subject with a gun:

- 19 ■ 6/22/2012 Mid-Term Evaluation

20 Off Donald struggled with report writing.

21 Officer Donald struggles in this area. He has had numerous rejected
22 reports in the past. Upon my review the reports were rejected for lack of
23 content and description.

1 ■ **Off Donald was not competent when Problem Solving.**

2
3 After several observations at different incidents I conclude that he
4 struggles with Problem Solving. He begins to think it through but fails to
5 communicate with other Officers about his process or what he intends to
6 do.

7 ■ **7/29/2012 -- Off Donald lacked sufficient skills in interacting with**
8 **“different groups/types of people.” Off Donald continued to struggle with**
9 **report writing.**

10 ■ **8/20/2012 – Off Donald struggled with responding appropriately to lessen**
11 **situations getting out of control.**

12 ■ **8/25/2012 – Sgt. Costello and Training Officer B. Wylie found Off**
13 **Donald’s “extreme emotional response” inappropriate.**

14 ■ **12/18/2012 -- Off Donald continued to fail to notify dispatch when**
15 **responding and failed to wait for backup.**

16 **Donald did not inform Dispatch that he was contacting a male**
17 **subject. Donald did not ask for a second unit. He failed to call the**
18 **subject out, but rather closed the distance.**

19 Incidents outlined above and more were never noted in Off Donald’s Progress
20 Reports dated Sept 2012 to March 2013. The Progress Reports all contained glowing
21 remarks about how great Off Donald performing as a training officer.

22 **B. By not waiting for back-up, Officer Donald placed himself in situations**
23 **where use of force was “inevitable”, it failed to provide Donald with**
24 **adequate and necessary training. The City was fully aware.**

1
2 1. Sergeant Allen Memo

3 In his memo to Lieutenant Holmes dated April 13, 2013, Sergeant Allen detailed
4 his concerns regarding Off Donald:

5
6 I am concerned that this is becoming a **reoccurring theme** for Officer Donald. I
7 am aware of other incidents (disorderly in bars – extracting one suspect from a
8 vehicle with other suspects still present in the car) where he acted alone in
9 situations where common sense and sound Police tactics call for more than one
Officer. In these prior instances, he was confronted by fellow Police Officers, but
the behavior has seemed to continue.

10 (Emphasis added). Sgt Allen voiced two concerns:

11 (1) Officer Donald did not wait for back up, and placed himself in a
12 position where the use of force was inevitable.

13 (2) Once Officer Donald was in that position, he made the decision to go
14 “hands on” with the aggressive suspect, exposing himself to attack
15 from the other three suspects that were present.

16 Sergeant Matt Renschler later noted in Off Donald’s April 30, 2013
17 Performance Review:

18 Officer Donald received counseling for taking independent action and failing to
19 wait for back-up during potentially dangerous situation earlier in the year. Several
20 of his reports were rejected by various supervisors for being unclear or lacking
21 sufficient detail. He needs to continue his efforts to improve communication skills
with various members of the public and document incidents in clear, detailed
reports.

22 The Board of Evaluators (BOE) highlighted:

1
2 It is the opinion of the Board of Evaluators (BOE) that Officer Donald
3 may, on occasion, have **difficulty taking feedback and/or input from**
4 **more senior officers (peers)**. It was said that at times he acts as if he is
5 **“done learning.”** Officer Donald also occasionally **engages in**
6 **independent actions which have the potential of placing himself**
7 **and/or other officers in danger**. There are performance areas needing
improvement but none so serious that it would cause the BOE undue
concern at this time. He has been, and will continue to be, counseled about
these things if they continue to be issues.

8 (Emphasis added).

9 Though Sergeant Allen identified the problems he recognized in Officer Donald
10 and had reported his concerns to Lt Holmes, though the evaluators had knowledge that
11 Officer Donald engaged in conduct which potentially placed himself or other officers in
12 danger, there is no record of Officer Donald receiving any type of follow-up training
13 related to Off Donald “engaging in independent actions which have the potential of
14 placing himself and/or other officers in danger.” Rather, the OPD simply “*counseled*”
15 Off Donald, expecting the problem to be solved. When questioned, Officer Donald
16 confirmed he never received additional training after he was counseled and had no
17 recollection of ever even seeing this memo. In fact, Officer Donald disagreed he did
18 anything wrong.

19 According to Scott Defoe, “Anything short of termination should have included
20 additional training and discipline to address the issues supervisors/evaluators noted
21 during probationary status.”

22 **2. January 7, 2014 Incident:**

23
24 PLAINTIFFS’ TRIAL BRIEF

25 Page 27 of 41

26 3:18-cv-05267

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On January 7, 2014, Donald was again involved in an incident where force was used without waiting for backup. Lt. Ray Holmes in his memo to the Deputy Chief Nelson wrote:

Another area of concern relates to Officer Donald's independent action during the second contact with the male Officer Donald placed himself in a predicament when he encountered Mr. Davis without a second officer.

Officer Donald did recognize that he needed additional units once Mr. Davis displayed hostile and uncooperative behavior. The goal is to get Officer Donald to understand that timing is essential when requesting a cover unit during citizen contacts. Specifically, that it is better to recognize non-compliant behavior and requesting another unit prior to engaging alone.

There is no record of Officer Donald receiving additional/particularized training related to this issue.

C. The City failed to properly train Officer Donald and was deliberately indifferent to his failures, which was the moving force behind the excessive force used.

1. Defensive Tactics Training: According to the 2008 Use of Force General Order (effective May 21, 2015), officers were required to participate in annual defensive tactics training. 1.4.3.(III(B)(1)). It reads:

Each officer shall be proficient in the use of the defensive tactics and the devices employed therein.

a. Participation in defensive tactics training sessions is mandatory for all officers except those subject to alternative training. [see 1.4.5]

b. Nonparticipation in any defensive tactics training session is reported to an employee's supervisor.

1 Annual defensive tactics training includes review of the Department's
2 force model and its application. [see 1.3.1(III)]

3 Chemical agents instructors conduct all defensive tactics training
4 related to use of oleoresin capsicum (OC) and/or other chemical
5 agents.

6 Less-lethal weapons instructors conduct all training related to use of
7 the Taser conducted energy weapon.

8 There is no record of Officer Ryan Donald attending Defensive Tactics Training
9 on 8/6/14, 8/20/14, 2/17/15, 3/4/15, and 3/18/15. It is safe to assume Off Donald failed to
10 attend all five training sessions.

11 Had Officer Donald attended his defensive tactics training, he would not have felt
12 it was "easier" to use his gun, rather than use less lethal force. Had Officer Donald
13 attended his defensive tactics training, he would have had more confidence in the
14 effectiveness of less lethal force, such as his OC spray or his Taser, and would have
15 learned how to transition from firearm to less lethal force or to retain his gun in its
16 holster.
17

18
19 **3. 2014 Gun Incident**

20 On August 19, 2014, while responding to an incident involving a simple assault,
21 Officer Donald saw the suspect "exit[ing] the front door of the house pulling a suit case,
22 still yelling back toward the front of the house" that she was leaving. When the suspect
23

1 “ignored [his] presence,” Officer Donald “unholstered [his] firearm, keeping it in a low
2 ready position, and told V/Shadduck to stop and show [him] her hands.” In response, the
3 suspect raised her hands, yelling, “F*** you – shoot me!”

4 During debriefing, the supervisor noted:

5 I debriefed the incident privately with Officer Donald, and specifically discussed
6 my concerns about his decision to unholster his firearm and have it in the “low
7 ready” position, as described in his report, absent articulable concerns of a
8 potential deadly force encounter. Despite my concerns about his tactics, I do not
believe it was a violation of policy.

9 Mr. Defoe:

10 It is my opinion that by not providing additional training to Officer Donald in the
11 use of force policy, by not correcting his behavior as mandated by its own policy,
12 and by not recognizing that Officer Ryan Donald’s behavior related to the use of
13 deadly force violated General Order 1.3, the Olympia Police Department failed in
its duty to insure that Officer Donald followed the use of force policy pursuant to
its protocol.

14 4. Warning before shooting.

15
16 OPD Use of Force Policy in effect in 2015 last revised on 11/19/2012, did not
17 inform its officers, including Donald, that a warning should be given prior to using
18 deadly force. In the 2017 policy, it reads: “*Under these circumstances, if feasible, some*
19 *warning should be given.*” Defense police practice expert, Paynter, was startled to learn
20 a warning provision did not appear in the Use of Force policy in effect during 2015.
21
22
23

1 It is disputed whether Officer Donald warned Plaintiff Chaplin and Thompson
 2 before firing his weapon. Not one civilian witness reported hearing Officer Donald's
 3 warning to shoot, though many heard his commands to "Get down!" "Stay down!"
 4 Fellow officer Paul Evers who was present at the scene shortly before shots were fired
 5 did not report hearing warnings to shoot, though he heard Donald's other commands.
 6

7 5. Donald did not attend CIT training for years 2014 and 2015.

8 In 2013, Donald received CIT (Crisis Intervention Training) at the WA Criminal
 9 Justice Training Center. Crisis Intervention training included "de-escalation, physical
 10 control tactics, less lethal and deadly force." Students were required to bring their Taser
 11 holster. However, there is no record that Donald attended or "passed" CIT training in
 12 2014 or prior to the incident in 2015. By not making sure Officer Donald attended CIT
 13 training, the City was deliberately indifferent to Officer Donald's failure to attend and
 14 "pass" Crisis Intervention Training.
 15

16 6. City failed to properly train Officer Donald in the use of his Taser.

17 OPD failed to adequately train Officer Donald in the use of CED/Taser in lieu of
 18 deadly force. As a result, Officer Donald failed to deploy his Taser -- a less lethal force
 19 -- when he had ample opportunity to do so before resorting to deadly force.
 20

21 ■ General Policy in effect prior to May 21, 2015 provided:
 22
 23

24 PLAINTIFFS' TRIAL BRIEF

25 Page 31 of 41

26 3:18-cv-05267

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1 Officers are required to successfully complete department
2 approved training conducted by a CED-certified instructor before
being assigned a device.

3 **Annual refresher training in CED is mandatory. During the**
4 **annual refresher training, officers who are unable to**
5 **demonstrate proficiency with the CED will not be authorized**
6 **its continued use of the device until remedial training is**
7 **successfully completed.**

8 Donald received 3 training sessions on the use of CED. Once on 8/22/2012,
9 another on 4/17/2013 and a 2-hr CED update (power-point presentation) on 11/26/2014
10 prior to May 2015. **The records show he attended, but they do not show whether or**
11 **not he was deemed qualified or that he demonstrated “proficiency” in the handling**
12 **of the device.**

13 Donald testified he had no independent recollection of qualifying during his
14 training sessions.

15 Further, in January 2014, the Department knew that its officers were “unclear as
16 to whether CED (TASER) would have been authorized under OPD policy during various
17 scenarios. However, the Department not only failed to adequately train its officers in the
18 use of Tasers, it did not purchase training Tasers until 2017 – two years after the incident
19 in question.
20

21 **Training officers noted on January 22, 2014:**

22 *Officers were unclear as to whether CED (TASER) would have been authorized*
23 *under OPD policy during various scenarios.*

24 PLAINTIFFS' TRIAL BRIEF

25 Page 32 of 41

26 3:18-cv-05267

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1 **This problem persisted and was noted in February 2014.**

2 *Many officers chose to go hands on with uncooperative suspects in the felony*
 3 *crime scenario after being advised the suspect was possibly armed. There was*
 4 *general confusion regarding whether the use of the CED (TASER) in that*
 5 *scenario was within policy. Many officers acknowledged the need for training*
 6 *CED's for more realistic based CED training. More than one officer admittedly*
 stated their transition from hand gun to CED probably would not have been as
 smooth as they performed it during the scenarios without training weapons.

7 *A need to purchase training CED's and use blue guns during scenarios was*
 8 *identified.*

9 Despite (1) there being general confusion amongst the officer regarding whether
 10 the use of the CEW (TASER) in various scenarios was within policy; (2) the City being
 11 aware that many officers admitted to needing additional training in the use of CED's for
 12 more realistic based CED training; (3) the City being aware that more than one officer
 13 admittedly stated their transition from hand gun to CED probably would not have been as
 14 smooth as they performed it during the scenarios without training weapons; and (4) the
 15 City being aware of the need to purchase training CED's and use blue guns during the
 16 scenarios presented to its officer, the City ignored and failed to properly train its officer
 17 in the use of CED's. Thus, the City was deliberately indifferent to the need to further
 18 train in the use of CED/Tasers. In fact, the City did not purchase training CED's until
 19 2017 – two years after the incident in question.

22 7. OPD failed to adequately train Donald when dealing with multiple subjects
 23 while responding alone.

1

2 ■ **January 2014 Defensive Tactics (DT) Training**

- 3 ■ 2 officer team DT mock scenes with 1 uncooperative assault
- 4 suspect and 1 uncooperative obstructing subject. Passive and
- 5 ■ 2 officer team DT mock scenes with 1 uncooperative assault
- 6 suspect and 1 uncooperative obstructing subject. Active and
- 7 assaultive resistance

8 After the training and while debriefing, training supervisors noted:

9 A need to provide further tactical training was identified as it pertains to

10 the set up and execution of high-risk scenarios. While it was found that officers

11 **loosely followed the tactical guidelines, it was found that poor planning and**

12 **execution put officers in a position where they could be severely injured or**

13 **the force needed to affect an arrest would be elevated given their decisions.**

14 ■ **February 19, 2014 -- training included**

- 15 ■ 1-officer mock scenes with 1 uncooperative felony suspect and
- 16 a second scene with an uncooperative misdemeanor suspect
- 17 ■ 2-team officer scenarios

18 During the debriefing, the supervisors noted:

19 Several officer continued to modify the straight-arm bar technique

20 under stress, by inappropriately using their legs to trip the suspect,

21 which increases the risk of injury to themselves when applying the

22 technique in the field. **Officers also continued to have difficulty**

23 **transitioning to a different technique when the one they had**

24 **originally attempted to apply was failing.**

25 ■ **August 6th and 20th 2014 Defensive Tactics Training [Donald did**

26 **not attend].**

Officers had to engage with a non-compliant suspect who used static resistance to prevent officers from placing him under arrest. The exercise involved a “**pair of officers** to gain control and maintain control of the scene both verbally and physically when needed.”

■ **October 1, 2014** – An 8-hour In Service training was held **involving a 2-officer team.**

8. Officer Donald was inadequately trained in the use of “less-lethal shotgun” with bean-bag rounds.

In order to qualify, Officers were required to demonstrate annually in the use of firearms, including the use of shotgun bean bag and “Pepperball.” Records show that officers were not tested in the “Less Lethal” category until 2015, and Donald did not pass his qualifications in the use of bean bag shotgun until 5 months after the incident, 10/24/2015 and 10/16/2015 respectively. (Off Donald last qualified on May 13, 2014. Hence, Off Donald had not passed his annual qualifications test prior to May 21, 2015).

During the incident, Officer Donald did not consider or attempt to use his Bean-bag Shotgun. Defoe determined Donald should have/could have taken his bean-bag shotgun with him to use if necessary when he chased after the plaintiffs.

IV. STATE CLAIM OF NEGLIGENCE

Even if Officer Donald’s story is to be believed, Police practice expert, Scott Defoe, determined Officer Donald used unreasonable police tactics when:

PLAINTIFFS’ TRIAL BRIEF
Page 35 of 41
3:18-cv-05267

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- He pulled his patrol vehicle facing Plaintiffs, rather than from the rear;
- He did not turn-on his emergency equipment when the area was pitch black with low hanging trees;
- He did not immediately identify himself as a police officer;
- He prematurely un-holstered his weapon;
- He did not wait for back-up when back-up officers were en-route;
- By not waiting for back-up when, according to Donald, Plaintiff Chaplin ran towards his patrol vehicle with his skateboard raised above his head as if to damage his patrol vehicle;
- He was a solo officer and he noticed they were “bigger and heavier” in stature;
- He moved from the driver’s-side door to the rear of the patrol vehicle to “meet-up” with them;
- He did not use defensive maneuvers against Thompson if indeed he was grabbed and pushed;
- By not bringing his Asp baton to work;
- By not using defensive tactic to create distance during the altercation to use his OC spray or his Taser;
- By chasing after the plaintiffs rather than wait for back-up and K-9 officers;

PLAINTIFFS’ TRIAL BRIEF

Page 36 of 41

3:18-cv-05267

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- By prematurely un-holstering his gun and keeping it in low-ready position before Plaintiffs emerged from the woods, thus necessitating the need to transition to less lethal force;
- By not using less lethal force against Chaplin;
- By not using less lethal force against Thompson;
- By not exercising gun retention techniques before firing his weapon.

Felony Conviction Superseded by Intervening Cause

Plaintiff were convicted of one count of Assault in the 3rd Degree against Officer Donald. Defendants will likely argue that this cause of action is unavailable to the Plaintiffs under RCW 4.24.420, which provides a defense to any action for damages for personal injury (notwithstanding an action under 42 U.S.C. § 1983) when the plaintiff is was engaged in the commission of a felony at the time of the injury. However, the statute further requires that the felony be the proximate cause of the injury. RCW 4.24.420. Proximate causation is not present when an independent, intervening act that could not reasonably have been foreseen by the defendant interrupts the causal chain. *Sluman v. State*, 418 P.3d 125, 150 (Wash. Ct. App. 2018).

That the Plaintiffs were convicted of assault in the third degree – a crime that requires only that the defendant intended to put Officer Donald in fear of bodily injury – supports that the Plaintiffs could not have reasonably foreseen that their conduct would result in Officer Donald's shooting them. Accordingly, the evidence will show that the

PLAINTIFFS' TRIAL BRIEF

Page 37 of 41

3:18-cv-05267

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1 element of proximate cause in this defense is not met, and that the defense articulated
2 under RCW 4.24.420 is inapplicable.

3 Furthermore, Officer Donald used deadly excessive force on two occasions – once
4 at the rear of his patrol vehicle and again near the wood line north of Cooper Point Rd.
5 According to Defoe, Officer Donald was negligent in his tactics and decisions leading up
6 to the firing of his weapon multiple times (once in the direction of fleeing suspects) at the
7 rear of his patrol vehicle. In fact, the City's protocol strictly forbids firing of warning
8 shots. Plaintiffs were not convicted of committing a felony during this earlier incident at
9 the rear of the patrol vehicle. Hence, the felony defense rule is inapplicable as it relates
10 to this earlier incident.
11

12 V. STATE CLAIM OF OUTRAGE

13 The tort of outrage requires the proof of three elements: (1) extreme and
14 outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3)
15 actual result to plaintiff of severe emotional distress. *Thomas v. Cannon*, 289 F.Supp.3d
16 1182, 1203 (W.D. Wash. 2018) (citing *Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d
17 630 (2003)).
18

19 Intentionally and recklessly firing warning shots into the pavement and once in
20 the direction of fleeing misdemeanor suspects is extreme and outrageous conduct.
21 Officer Donald knew when he fired those shots, the shots would cause emotional distress,
22 but he disregarded it. In fact, the shots were fired with the specific purpose to cause
23

24 PLAINTIFFS' TRIAL BRIEF

25 Page 38 of 41

26 3:18-cv-05267

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1 severe emotional distress. To frighten them into submission. To teach them a lesson
 2 they would never forget. To let them know who was boss.

3 VI. DAMAGES

4 Mr. Chaplin and Mr. Thompson each seek general damages for their injuries
 5 caused by Officer Donald and the City of Olympia. Mr. Chaplin and Mr. Thompson do
 6 not seek economic damages in the form of past medical care, past wage loss or future loss
 7 of wages or earning capacity. However, Mr. Chaplin seeks economic damages for future
 8 medical care, treatment and services, as well as necessary household help and expenses
 9 associated with his long term care needs. Mr. Chaplin and Mr. Thompson also seek
 10 punitive damages for Defendant Donald's violation of the Plaintiffs' civil rights
 11 guaranteed by the United States Constitution. Finally, Mr. Chaplin and Mr. Thompson
 12 seek costs, expenses, and reasonable attorney's fees pursuant to all applicable statutory
 13 authority including, but not limited to 28 U.S.C. § 1920, 42 U.S.C. § 1988, and RCW
 14 4.84, et seq., and any further relief as the court may deem just and equitable.
 15

16
 17 DATED this 3rd day of September, 2019.
 18

19
 20 By: /s/ Sunni Ko
 21 SUNNI KO, WSBA# 20425

22 LAW OFFICES OF SUNNI KO
 23 1105 Tacoma Avenue South
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24 PLAINTIFFS' TRIAL BRIEF
 25 Page 39 of 41
 26 3:18-cv-05267

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PLAINTIFFS' TRIAL BRIEF

Page 40 of 41

3:18-cv-05267

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CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on the below date I caused to be served the foregoing document on:

Attorney for Defendants

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Kimberly J. Waldbaum
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801 Second Avenue, Suite 1210
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() Via U.S. Mail
() Via Facsimile
() Via Hand Delivery
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SIGNED this 3rd day of September, 2019, at Tacoma, Washington.

/s/ Marie Lucente
Marie Lucente
Legal Assistant to Monte Bersante